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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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Signature	/Alan S. Cooper/
Date	03/23/2011
Attachments	Brinks - Motion 23-Mar-2011.pdf (4 pages)(127773 bytes) Brinks - Memo in Support of Motion 23-Mar-2011.pdf (6 pages)(272354 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED)	
)	
Opposer)	
)	
v.)	Opposition No. 91164764
)	
BRINKMANN CORPORATION)	
)	
Applicant)	

MOTION TO STRIKE APPLICANT'S SUR-REPLY
MEMORANDUM IN OPPOSITION TO OPPOSER'S
MOTION FOR SUMMARY JUDGMENT DISMISSING
APPLICANT'S PRIOR REGISTRATION DEFENSE

On March 14, 2011, Applicant filed a Sur-Reply Memorandum in opposition to Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Prior Registration Defense. Opposer respectfully moves the Board to strike Applicant's Sur-Reply Memorandum which clearly is in clear violation of Rule 2.127(a) of the Trademark Rules of Practice.

The grounds in support of this motion are as follows:

- (1) Opposer filed a Motion for Partial Summary Judgment seeking to dismiss Applicant's Prior Registration Defense on January 5, 2011.
- (2) Applicant filed its Memorandum in opposition to that motion for partial summary judgment on February 9, 2011, and Opposer filed its Reply Memorandum in Support of that motion on February 24, 2011.


- (3) On March 14, 2011, Applicant filed a Sur-Reply Memorandum in opposition to Opposer's Motion for Partial Summary Judgment to Dismiss Applicant's Prior Registration Defense which precipitated the present motion.
- (4) Applicant's Sur-Reply Memorandum is inappropriate and should be stricken or given no consideration because it clearly violates Rule 2.127(a) of the Trademark Rules of Practice which states, in pertinent part, that once a reply brief in support of a motion has been filed "[n]o further papers in support of or in opposition to a motion will be considered by the Board."
- (5) The same point also is clearly stated in TBMP § 502.02(b) which provides that a sur-reply memorandum filed in violation of Rule 2.127(a) may be returned to the filing party.
- (6) This is not the first time that the plain mandate of Rule 2.127(a) has been ignored. Specifically, on July 30, 2010, Applicant filed a Sur-Reply Memorandum in opposition to Opposer's Motion for Leave file Third Amended Notice of Opposition. In its Order entered on November 18, 2010, the Board specifically noted that "Applicant's brief, filed July 30, 2010, is an impermissible surreply to opposer's motion for leave to amend, and has been given no consideration."
(Order, p. 1, fn. 1.)

For the reasons stated above and in the supporting Memorandum submitted concurrently herewith, it is respectfully submitted that Applicant's Sur-

Reply Memorandum should be stricken and/or not given any consideration by the Board in ruling on Opposer's Motion for Partial Summary Judgment.

BRINK'S NETWORK, INCORPORATED

Dated: March 23, 2011

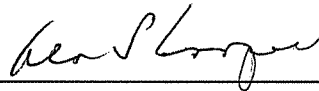
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Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Strike Applicant's Sur-Reply Memorandum in Opposition to Opposer's Motion for Summary Judgment Dismissing Applicant's Prior Registration Defense was served on the following counsel of record for Applicant by depositing the same in the U.S. Mail, first class mail postage prepaid, this 23rd day of March, 2011:

Gary A. Clark, Esq.
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Opposer)	
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v.)	Opposition No. 91164764
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I. INTRODUCTION

Opposer sincerely regrets having to burden the Board with yet another motion in this proceeding. However, the Sur-Reply Memorandum in opposition to Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Prior Registration Defense filed by Applicant on March 14, 2011, is plainly in violation of Rule 2.127(a) of the Trademark Rules of Practice and accordingly should be stricken and/or given no consideration by the Board in deciding the motion to which it is directed.

II. STATEMENT OF MATERIAL FACTS

Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Prior Registration Defense was filed on January 5, 2011. Applicant filed its Memorandum in opposition to that motion on February 9, 2011, and Opposer filed its Reply Memorandum in support of the motion on February 24, 2011.

On March 14, 2011, Applicant filed the Sur-Reply Memorandum which is the subject of the present motion. As discussed below, Applicant's Sur-Reply Memorandum is inappropriate and should be stricken because it clearly violates Rule 2.127(a) of the Trademark Rules of Practice.

This is not the first time Applicant has ignored the clear mandate of Rule 2.127(a). On July 30, 2010, Applicant filed a Sur-Reply Memorandum directed to Opposer's Motion for Leave file Third Amended Notice of Opposition. In the Order entered on November 18, 2010, the Board specifically noted that "Applicant's brief, filed July 30, 2010, is an impermissible surreply to opposer's motion for leave to amend, and has been given no consideration." (Order, p. 1, fn. 1.)

III. ARGUMENT

The introductory paragraph in Applicant's Sur-Reply Memorandum -- like the same paragraph in its earlier Sur-Reply Memorandum filed on July 30, 2010 -- states that "Applicant Brinkmann is mindful that sur-replies are generally not considered by the Board, but respectfully submits that this sur-reply is necessary in order to address certain arguments made for the first time in Opposer's Reply that should have been submitted in Opposer's Motion." As discussed below, that statement with respect to the Board's consideration of sur-reply briefs is not only inaccurate, but is in direct conflict with Rule 2.127(a) and the other authority discussed below.

The present motion to strike is the proper procedural means for raising the impropriety of the filing of a sur-reply brief. See Lalonde, *Gilson on Trademarks*, § 26.09[14] (The Rules of Practice prohibit the filing of sur-reply briefs and a party may move on that ground to strike such briefs).

Rule 2.127(a) of the Trademark Rules of Practice provides that the moving party may submit an initial brief and a reply brief and that the opposing party may submit an opposing brief, but expressly states that the “Board will consider no further papers in support of or in opposition to a motion.” Fully consistent with that provision, TBMP § 502.02(b) states that once the briefs specified in Rule 2.127(b) have been filed, “[n]o further papers (including surreply briefs) will be considered by the Board, and any such papers filed in violation of this rule may be returned to the filing party.”¹ See also Handelman, *Guide to TTAB Practice*, § 14.02[C] (“Once a reply brief is filed, no further papers in support of or in opposition to a motion will be considered by the Board.”); Kruger, *Trademark Trial and Appeal Board Practice and Procedure* (2010-2011 Ed.), § 3:17 (After the moving party’s reply memorandum has been filed, “[n]o additional papers in support of or in opposition to the motion will be considered.”); Lalonde, *Gilson on Trademarks*, § 26.09[2][d] (After the moving party’s reply memorandum has been filed, “[t]he Board will not consider any more documents in support of or in opposition to a motion, including sur-replies.”); Hudis (editor), *A Legal Strategist’s Guide to Trademark Trial and Appeal Board Practice*, p. 106 (Once the reply brief has been filed, “[n]o further papers, including surreply briefs, will be considered by the Board.”).

Consistent with this authority, the Board has repeatedly rejected sur-reply briefs and has not given those submissions any consideration in deciding a pending motion. E.g., *Gunty-Renker Corp. v. Boyd*, 88 USPQ2d 1701, 1702 (TTAB 2008); *No Fear Inc.*

¹ The same restriction applies in the case of briefs on the merits of the case. See TMBP § 801.02(d) (“There is no provision for filing a reply brief, rebuttal brief, rebuttal brief, rejoinder brief, etc. by a party in the position of defendant. If a party in the position of defendant files such a brief, it may be stricken, or given no consideration, by the Board.”).

v. Rule, 54 USPQ2d 1551, 1553 (TTAB 2000); *University of Southern California v. University of South Carolina*, 2003 TTAB LEXIS 367 (TTAB, July 21, 2003) (non-precedent) (Applicant's motion for leave to file a surreply brief was denied because Rule 2.127(a) prohibits the filing of such papers); *Folie A Deux Winery v. Renwood Winery, Inc.*, 2000 TTAB LEXIS 836 (TTAB, Dec. 18, 2000) (non-precedent) (Respondent's motion to strike petitioner's surreply brief in opposition to respondent's motion for summary judgment stricken because Rule 2.127(a) does not provide for such briefs).²

As noted above, the Board made precisely the same determination in its Order entered in this proceeding on November 18, 2010, which states that "Applicant's brief filed on July 30, 2010, is an impermissible surreply to opposer's motion for leave [to file an Amended Third Notice of Opposition] and has been given no consideration." (Order p. 1, fn. 1.)

Applicant's Sur-Reply Memorandum understandably does not even mention Rule 2.127(a), much less present any argument directed to the clear mandate of Rule 2.127(a) because there is no such argument to be made.

Because of the express preclusion of any further memoranda presenting legal arguments directed to a motion set forth in Rule 2.127(a), Opposer has refrained from addressing or responding to any of the substantive points set forth in Applicant's improperly filed Sur-Reply Memorandum.

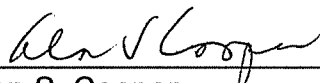
² Although the *University of Southern California* and the *Folie A Deux Winery* cases are non-precedent, they do have persuasive value in this context and accordingly should be considered by the Board. See USPTO's Official Gazette Notice, dated January 23, 2007 ("[a] decision designated as not precedential is not binding upon the TTAB but may be cited for whatever persuasive value it might have.").

III. CONCLUSION

For the reasons stated above, Opposer respectfully submits that no consideration should be given to Applicant's Sur-Reply Memorandum and that it should be stricken.

BRINK'S NETWORK, INCORPORATED

Dated: March 23, 2011

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Attorneys for Opposer

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I hereby certify that a true copy of the foregoing Memorandum in Support of Motion to Strike Applicant's Sur-Reply Memorandum in Opposition to Opposer's Motion for Summary Judgment Dismissing Applicant's Prior Registration Defense was served on the following counsel of record for Applicant by depositing the same in the U.S. Mail, first class mail postage prepaid, this 23rd day of March, 2011:

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